UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2466

8/18/95

Draft - please review + provide comments to Melanie Pallman by Monday noon (8/21). I want to start routing this for concur. on Mon pm.
Thanks,
Melanie

Ref: 8WM-C

David Holm, Director
Water Quality Control Division
WQCD-DO-B2
Colorado Department of Health
4300 Cherry Creek Drive South
Denver, Colorado 80222-1530

Re: Sunnyside Mine Lawsuit

Dear Mr. Holm:

Thank you for the opportunity to consult with you concerning this case. EPA is pleased that Colorado has chosen to use a watershed approach to address point source and non-point source pollution in the Animas basin. However, we are concerned that the Stipulated Agreement (check name) will not conform with EPA's position on several key issues relating to hard rock mines and the Clean Water Act (CWA). In the following paragraphs, we explain EPA Region VIII's position relating to the issues at this site.

Ground Water Hydrologically Connected to Surface Water (including seeps)

EPA determined that seeps and other less obvious discharges fall within the definition of "point source". It is therefore, EPA's position that seeps and other ground water discharges hydrologically connected to surface water from mines, either active or abandoned, are discharges from point sources and are subject to regulation through an NPDES permit. Current EPA policy, as augmented by several lawsuits, indicates that it is more the mine or the facility itself that is subject to NPDES regulations. Therefore, any seeps coming from identifiable sources of pollution (i.e., mine workings, land application sites, ponds, pits, etc.,) would need to be regulated by discharge permits.

As EPA stated at out last meeting, it is our position that the trading of point sources and non-point sources (the so called "bubble" approach) is acceptable only if the facility is subject to an NPDES permit. In the case of Sunnyside mine, we suggest that a TMDL approach be utilized to determine the appropriate permit limits. We do not agree that a permit is not required for the seepage and would consider the facility to be discharging without a permit when the seepage begins. Further, this application of the Clean Water Act is consistent with other sites in Colorado (Eagle Mine, Conoco, Colorado Refining, Climax Urad to name a few).

Appropriate Clean Up Goal

As stated above, we believe that a TMDL approach should be used to establish permit limitations that would be tied to an in-stream compliance point. We are concerned that the agreement with Sunnyside Mine will make the underlying standard (225 μg/l zinc) unreachable. If Sunnyside is allowed to clean up to the goal in the agreement (530 μg/l zinc), the seepage from the workings in the long-term could prevent the establishment of a fishery.

It is our understanding that a strong consensus has been reached among the Division, the Water Quality Control Commission, EPA, Sunnyside Gold, and the other stakeholders in the basin that water quality improvement sufficient to support some type of aquatic life use (e.g., brown trout) is an appropriate goal. Based on this understanding, we do not understand why the proposed settlement agreement does not appear to support that long-term goal. While we recognize that there are questions regarding the appropriate numeric standard for zinc, and there are questions regarding the potential effectiveness of the various proposed clean-up projects, there is little question that further water quality improvement is necessary. We are hopeful that you and the Division will be able to explain how the proposed settlement agreement supports, or at least is compatible with, the long-term goal of improving water quality in the Animas River. The enclosed list of questions and comments are intended to provide further detail regarding our concerns.

Ability of Projects to Meet Clean Up Goal

We are concerned that the combined "A List" and "B List" of projects will fail to meet even the current goal of 530 μg/l zinc. Performance goals should be implemented for non-point source clean ups. There should be provision in the agreement for review of the success of the non-point source clean-ups with the ability to require further and/or different measures if the measures implemented fail to adequately remove the projected zinc load. In addition, contingencies should be built into the agreement to require long-term active treatment if the A List and B List clean-ups do not remove enough zinc.

Maintaining Water Quality (Financial Guarantee)

It is of increasing importance to financially guarantee compliance with environmental performance at all phases of the mining operation including post-closure. This has been mentioned by both Region VIII and EPA Headquarters' staff during discussions of environmental impact statements and NPDES permits for new mines. Clearly, the public's financial costs of Summitville is also a strong argument for financial guarantees. Therefore, we do not feel comfortable allowing only Sunnyside to sign the Stipulated Agreement. The agreement should be signed by Sunnyside and Echo Bay.

If you wish to request a conference call to further discuss these issues or if you have any other comments please contact me.

Sincerely,

Max H. Dodson
Director
Water Management Division

Enclosure

cc: Pat Nelson, CDPHE

1. **What are the Division's long-term goals for improving zinc concentrations in the Animas River basin?** We support the Water Quality Control Commission's goal of improving water quality in the basin. However, the proposed settlement seems to be directed toward simply maintaining existing zinc concentrations.

2. **Why is the existing 85th percentile zinc quality of 520 ug/l in segment 4a being used as a water quality goal, when support of the current designated use in this segment seems to require that a lower concentration be reached?** The Commission has adopted a chronic zinc numeric standard (effective in 1998) of 225 ug/l. That numeric standard is intended to prevent chronic toxicity to brown trout. The current designated use of segment 4a is Aquatic Life Cold 2, and the Commission has adopted a use of Aquatic Life Cold 1 that is scheduled to become effective in 1998. Why is 225 ug/l (or some other level deemed protective of aquatic life) not being used as the goal? Does the Division believe that 520 ug/l is protective of the desired aquatic life use?

3. **Why has the Division not prepared a basin-wide assessment of all zinc sources and allocated to Sunnyside a reasonable portion of the load reductions that will be necessary to protect the designated use in segment 4a?** Eventual support of aquatic life uses seems to require reductions in zinc loadings basinwide (particularly if brown trout is the goal). Clearly, the Sunnyside Mine cannot be held responsible for all of the required reductions. But why should they not be held responsible for a portion of the reductions that will be necessary? We believe that such an approach is reasonable given the mine's request for final closure and release from permit responsibilities.

4. **Once execution of the settlement agreement is completed, what further opportunities for reductions in zinc loadings will exist at that point?** One outcome of the settlement will be that many of the promising opportunities for reducing zinc loadings will be exhausted, leaving an uncertain path toward future improvements. Has the Division identified opportunities for reductions in zinc loadings which are not included in the list of mitigation projects, and will they reasonably provide an opportunity for improving zinc concentrations to levels that will protect the desired aquatic life use?

5. **What further responsibilities will Sunnyside Mine face if, following completion of the settlement agreement, monitoring data show that zinc loadings and ambient concentrations increase?** There seems to be substantial uncertainty regarding the potential effectiveness of the plug and the loading reductions possible from completion of the mitigation projects. What contingencies are included in the settlement agreement in the event that ambient zinc concentrations increase?